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Nos. 95-1223 and 95-1271

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

A.A. & M. CARTING SERVICE, INC., *et al.*,
Petitioners,

v.

TOWN OF BABYLON, NEW YORK, COMMERCIAL GARBAGE DISTRICT NO. 2, also known as COMMERCIAL WASTE COLLECTING and RECYCLING DISTRICT, *et al.*,
Respondents,

U.S.A. RECYCLING, INC., *et al.*,
Petitioners,

v.

TOWN OF BABYLON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR *AMICUS CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

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BRIEF FOR *AMICUS CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 1300 member companies operate in virtually all 50 states, and who are engaged in the full spectrum of solid waste

management services. NSWMA's members include collectors and transporters of solid waste, operators of solid waste treatment, storage, and disposal facilities, waste recyclers, manufacturers and distributors of waste management equipment, and firms providing legal, financial, and consulting services to the solid waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.[1]

NSWMA represents the interests of the solid waste management industry in judicial, legislative, and administrative forums. One threat to which the industry is perpetually subject is state and local efforts to prevent the interstate movement of waste for storage, treatment, disposal, or recycling. Such measures necessarily obstruct the interstate movement of waste, and thus, directly and adversely affect the interests of NSWMA's members. Accordingly, the NSWMA has a strong interest in presenting the views of its membership on the constitutionality of the flow control scheme at issue here.

SUMMARY OF ARGUMENT

The decision below is one of a series, arising in the aftermath of this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 114 S. Ct. 1677 (1994) ("*Carbone*"), in which courts of appeals have upheld efforts by states or localities to evade *Carbone* by various methods designed to insure that waste continues to be funneled to local disposal facilities. Those decisions have already spawned four petitions for certiorari seeking review by this Court. While the waste control schemes devised by the towns and the rationale adopted by the courts for upholding them differ in the various cases, the underlying message is the same—despite *Carbone*, towns need not dismantle their protectionist waste control schemes. They

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[1] All of the parties in this case granted their consent to this amicus brief as reflected in letters filed with the Clerk of the Court.

need only replace their flow control ordinances with more ingenious techniques for achieving the same result.

Review by this Court is thus urgently needed to address these efforts by localities to evade *Carbone*. It seems certain that, absent intervention by this Court, localities—emboldened by decisions such as this—will continue efforts to block the flow of waste beyond their borders. At the time this Court handed down its opinion in *Carbone*, approximately 43 states had authorized local governments to institute flow control ordinances.[2] The waste facilities those ordinances were designed to protect cost millions to build and receive millions in revenues.[3] Because of the huge economic stakes involved, it is inevitable that numerous localities, such as Babylon here, will continue to seek to devise waste management plans that modify the form of their waste flow regimes without altering their substance. And the Second Circuit's decision in this case has provided those localities with a road map to achieve their protectionist goals.

The judicial approval of these municipal waste schemes has occurred against the backdrop of the repeated failure of state and local governments to convince Congress to enact legislation authorizing local control of the flow of waste. Thus, even though Congress has chosen to leave the constraints of the Commerce Clause intact, certain courts have not. And in upholding evasive municipal schemes, these courts have traded the task of conducting Commerce Clause scrutiny to become virtual "legislatures of last resort"—taking on a policy-making role properly reserved for Congress.

Moreover, this decision has ramifications far beyond the waste flow context. The court of appeals here upheld

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[2] *House Comm. on Energy & Commerce, State Control of Management of Municipal Solid Waste*, H.R. Rep. No. 738, 103d Cong., 2d Sess. 7 (1994).

[3] *See* Sidney M. Wolf, *The Solid Waste Crisis: Flow Control and the Commerce Clause*, 39 S.D. L. Rev. 529, 567 (1994).

the waste flow scheme at issue on the basis of a fragmented, component-by-component application of the market participation doctrine—an approach which finds no support in the decisions of this Court and provides a blueprint for states and towns seeking to avoid Commerce Clause restrictions on a wide range of governmental activities. The potential impact of this decision on dormant Commerce Clause jurisprudence is a further reason justifying review by this Court.

ARGUMENT

I. LOWER COURTS ARE UPHOLDING THE FLOW CONTROL SCHEMES OF LOCALITIES IN DEFIANCE OF THIS COURT'S DECISION IN *CARBONE* AND CONGRESS' REFUSAL TO AUTHORIZE SUCH LAWS

State and local laws restricting the free movement of trash in interstate commerce have proved to be a particularly nettlesome subject requiring repeated attention by this Court. Over seventeen years ago, the Court ruled that trash is entitled to the protection of the Commerce Clause and that state or local laws restricting the *import* of trash constitute a discrimination against interstate commerce that is virtually *per se* invalid. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). The law laid down in *City of Philadelphia* seemed clear. Yet in its aftermath the Court on three separate occasions was forced to confront local schemes—upheld by the lower courts—designed to continue to discourage the import of out-of-state waste. In each instance, this Court found that the newly devised scheme discriminated against interstate commerce. *Oregon Waste Sys., Inc. v. Department of Envtl. Quality*, 114 S. Ct. 1345 (1994); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't Natural Resources*, 504 U.S. 353 (1992).

Carbone was the first case to address the constitutionality of a local law designed to prohibit the *export* of trash to out-of-state points. This Court's ruling was again unequivocal—such a law is "just one more instance of local processing requirements that we long have held invalid." *Carbone*, 114 S. Ct. at 1682. Because the "design and effect" of the ordinance was to "hoard[] solid waste, and the demand to get rid of it, for the benefit of the preferred processing facility," *id.* at 1683, the export restraint was held to discriminate against interstate commerce.

Just as before, however, localities are devising means to avoid this Court's Commerce Clause teachings. And, as the Second Circuit's decision demonstrates, these efforts, just as before, are striking a responsive, and indeed, far more dangerous chord in the lower courts. Through a contorted application of the market participant doctrine, the Second Circuit here has created an exception to the Commerce Clause that permits localities to block the free flow of interstate commerce at will, simply by structuring their laws so that their protectionist goals are accomplished by indirect means. If this sort of evasion is countenanced, this Court's *Carbone* decision will become a dead letter.

The lower court's conclusion is plainly wrong. This Court has repeatedly rejected the argument that under the Commerce Clause a local government may do indirectly what it cannot do directly. Indeed, the point was reemphasized only a few weeks after *Carbone* was decided:

> Commerce Clause jurisprudence is not so rigid as to be controlled by the form by which a State erects barriers to commerce. . . . *"The commerce clause forbids discrimination, whether forthright or ingenious.* In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its *practical operation* work discrimination against interstate commerce."

West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2215-16 (1994) (quoting *Best & Co. v. Maxwell*, 311 U.S. 454, 455-56 (1940) (emphasis added)).

West Lynn Creamery also dramatically illustrates another dictate that the Second Circuit declined to follow. The court of appeals viewed its task as one of "decid[ing] whether each [of three] components of Babylon's waste system constitutes 'regulation' of commerce and, if so, whether such regulation violates the Commerce Clause." (Pet. App. at 17a.) The Second Circuit then analyzed each component separately, finding that some constituted market participation and thus were not subject to the Commerce Clause, and that some constituted regulation but, viewed in isolation, did not discriminate against or burden interstate commerce. (*Id.*) But this Court explicitly rejected such a component-by-component approach in *West Lynn Creamery*, 114 S. Ct. at 2215, instead requiring that "the constitutionality of the program as a whole" be scrutinized.

The Third Circuit also demonstrated its unwillingness to accept the teachings of *Carbone* in *Harvey & Harvey, Inc. v. County of Chester*, 68 F.3d 788 (3d Cir. 1995), *petition for cert. filed sub nom. Tri-County Indus. v. County of Mercer*, 64 U.S.L.W. 3510 (U.S. Jan. 30, 1996) (No. 95-1127). As the petition for certiorari filed in that case explains in more detail, the Third Circuit's decision addressed two separate Commerce Clause challenges to municipal "flow control" plans. In evaluating the constitutionality of those schemes, the Third Circuit focused on "the process of selecting waste service providers rather than on the effect of the regulation once a provider or providers have been chosen." *Id.* at 802. The court conceded: "we cannot cite any authority for th[is] sort of inquiry." *Id.* Despite this lack of support, however, it concluded that as long as the selection process for the favored facility is open and competitive to in- and out-of-state businesses, then there is no Commerce Clause

violation. *Id. Carbone,* of course, never mentions "process"; instead it stresses that the focus must be on the "design and *effect*" of the challenged scheme. *Carbone,* 114 S. Ct. at 1683 (emphasis added).

It appears that some lower courts have basically concluded that local waste control is desirable from a policy standpoint, and are determined to uphold waste control schemes even if this requires a distortion of fundamental Commerce Clause jurisprudence. But in so doing, the courts are arrogating to themselves a role that is reserved to Congress. As Justice O'Connor pointed out in her concurring opinion in *Carbone,* "[i]t is within Congress' power to authorize local imposition of flow control." 114 S. Ct. at 1692. Until it does so, however, waste control schemes that direct waste to a local facility "cannot survive constitutional scrutiny." *Id.*

Since *Carbone* was decided, state and local government have made repeated efforts to persuade Congress to enact legislation authorizing local control of the flow of waste.[4] These efforts have been vigorously opposed by *amicus* NSWMA and numerous members of the solid waste industry, as well as other parties concerned about the proposed interference in the free market for waste services.[5] Thus far Congress has refused to enact any of

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[4] *See, e.g.*, S. 534, 104th Cong., 1st Sess. (1995); S. 465, 104th Cong., 1st Sess. (1995); H.R. 2323, 104th Cong., 1st Sess. (1995); H.R. 1180, 104th Cong., 1st Sess. (1995); H.R. 1288, 104th Cong., 1st Sess. (1995); H.R. 1085, 104th Cong., 1st Sess. (1995); S. 485, 104th Cong., 1st Sess. (1995); H.R. 24, 104th Cong., 1st Sess. (1995); S. 398, 104th Cong., 1st Sess. (1995); H.R. 342, 104th Cong., 1st Sess. (1995); H.R. 225, 104th Cong., 1st Sess. (1995); H.R. 2838, 104th Cong., 1st Sess. (1995); H.R. 4779, 103d Cong., 2d Sess. (1994).

[5] *See Flow Control Measures and Interstate Transportation of Solid Waste: Hearing Before the Subcomm. on Commerce, Trade, and Hazardous Materials of the House Comm. on Commerce,* 104th Cong., 1st Sess. 29-36, 68-77, 131-33 (1995) (statements of H. Steven Walton, on behalf of the National Solid Wastes Management

the proposed bills, choosing instead to leave the constraints of the dormant Commerce Clause intact. In these circumstances, it is particularly important that the lower courts not be permitted to effectively nullify *Carbone* by upholding waste control schemes that Congress has repeatedly refused to authorize.[6]

The road map laid out by the decision below is certain to be followed by states and localities across the nation. The flow control ordinances that proliferated within the past decade were motivated by simple economic self-interest on the part of the local governments: having undertaken various forms of financial commitments to local waste facilities, local governments have a strong interest in insuring that all trash in the town goes to the local facilities. *See Carbone*, 114 S. Ct. at 1684

Association; Richard F. Goodstein, Browning Ferris Industries; and Kay Martin, Ventura County, California); *Flow Control and Interstate Transportation of Solid Waste: Hearing Before the Subcomm. on Superfund, Waste Control and Risk Assessment, Senate Comm. on Public Works*, 104th Cong., 1st Sess. 35-39, 43-45 (1995) (statements of Jonathan H. Adler, Cooperative Enterprise Institute and Anthony F. Ciofalo, Chairman, National Solid Wastes Management Association).

[6] There is nothing new about state and local efforts to persuade Congress to overturn decisions of this Court striking down local restrictions on the free flow of waste. Indeed, seventeen years after this Court's decision in *City of Philadelphia*, state and local governments are still attempting to persuade Congress to authorize local restrictions on the *import* of out-of-state waste. *See, e.g.*, S. 373, 104th Cong., 1st Sess. (1995); H.R. 1180, 104th Cong., 1st Sess. (1995); S. 589, 104th Cong., 1st Sess. (1995); H.R. 1288, 104th Cong., 1st Sess. (1995); S. 465, 104th Cong., 1st Sess. (1995); H.R. 227, 104th Cong., 1st Sess. (1995); H.R. 1249, 104th Cong., 1st Sess. (1995); S. 534, 104th Cong., 1st Sess. (1995); H.R. 2323, 104th Cong., 1st Sess. (1995); H.R. 4779, 103d Cong., 2d Sess. (1994); S. 2126, 103d Cong., 1st Sess. (1994); H.R. 963, 102d Cong., 1st Sess. (1993); H.R. 3952, 102d Cong., 1st Sess. (1991). Here too, Congress has thus far refused to authorize such actions on the part of state or local governments.

("flow control ordinance is a financing measure").[7] Compliance with *Carbone* means that those local facilities will now have to compete for trash with out-of-town and out-of-state facilities. And to do so, the local facilities may be forced to lower their prices—which may well require the town to make good on the financial guarantees to the facility. Doing this "through general taxes or municipal bonds," as this Court suggested in *Carbone, id.*, is likely to be politically unpopular. Thus there are strong economic and political incentives for local governments to seize upon any opening created by the courts of appeals to perpetuate their flow control regimes in another form. This practical consequence underlines the importance of prompt consideration of this issue by this Court.

II. REVIEW BY THIS COURT IS NEEDED TO CLARIFY THE LIMITS OF THE "MARKET PARTICIPANT" DOCTRINE

The Second Circuit upheld the flow control scheme at issue by reliance on the so-called "market participant" doctrine. In so doing, it has stretched that doctrine far beyond any plausible limits, creating an exemption that threatens to swallow the rule prohibiting discrimination against interstate commerce.

This Court itself has recognized that the "precise contours of the market-participant doctrine"—which have been addressed by this Court in only five cases—"have yet to be established." *South Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 93 (1984). And a number of federal courts of appeals have expressed their uncertainty as to the application of that doctrine to a variety of fac-

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[7] *See also* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action (Background Document)*, at 3.B-2 (Sept. 1988); Eric S. Petersen & David N. Abramowitz, *Municipal Solid Waste Flow Control in the Post-Carbone World*, 22 Fordham Urb. L.J. 361 (Winter, 1995); Kelly Outten, Note, *Waste to Energy: Environmental and Local Government Concerns*, 19 U. Rich. L. Rev. 373, 392 (1985).

tual circumstances. *See, e.g., GSW, Inc. v. Long County*, 999 F.2d 1508, 1511 (11th Cir. 1993) ("market participant doctrine . . . is a relatively new and difficult area of the Supreme Court's jurisprudence"); *Big Country Foods, Inc. v. Board of Educ.*, 952 F.2d 1173, 1178 (9th Cir. 1992) ("line between state market paritcipation and state regulation is a fuzzy one that has perplexed courts and commentators alike"); *Swin Resource Sys., Inc. v. Lycoming County*, 883 F.2d 245, 249 (3d Cir. 1989) ("[a]pplication of the distinction between 'market participant' and 'market regulator' has . . . occasioned considerable dispute"), *cert. denied*, 493 U.S. 1077 (1990). Given the nationwide importance of solid waste flow control, and the pivotal importance of the market participant doctrine in the Second Circuit's analysis, this Court should grant certiorari in order to clarify the relationship of that doctrine to general Commerce Clause jurisprudence.

The basic thrust of the market participant doctrine seems straightforward: it permits a locality to discriminate, under certain circumstances, in favor of its own residents when it purchases goods,[8] sells goods[9] or hires workers.[10] The rationale is that when the government participates in the marketplace like any private business, it has the prerogative to choose with whom it will deal, just as a private business can do.

The Second Circuit, however, has improperly expanded the "market participant" doctrine to condone a town doing what no private company could do—compel potential customers to use its services. Babylon does not just impose conditions on the collection and disposal of waste

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[8] *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Wyoming v. Oklahoma*, 502 U.S. 437 (1992).

[9] *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

[10] *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983).

generated by the town itself—*i.e.*, by the City Hall, the town jail and other town buildings. Rather, through the use of its regulatory powers, Babylon has effectively compelled commercial businesses in the town to utilize the local disposal facility. This makes Babylon a "market regulator," not a "market participant."

Indeed, rather than a "market participant," Babylon is more properly characterized as a market monopolist. Unlike the other "market participant" cases cited above, Babylon has not entered into a commercial transaction in the marketplace alongside private businesses. *See Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340, 1342-43 (9th Cir. 1984) (declining to apply "market participant" exception since California's Lands Commission had "a complete monopoly over the sites" being leased; only "state's participation in the marketplace *as a competitor* to be shielded from the Commerce Clause") (emphasis added), *aff'd mem.*, 471 U.S. 81 (1985). Far from subjecting itself to the same restrictions imposed on private businesses in the marketplace—the prime justification for relieving a town of Commerce Clause restraints when it acts as a market participant [11]—Babylon here has used its regulatory power to create for itself a monopoly in the market it has chosen to enter. The fact that Babylon's monop-

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[11] *Reeves*, 447 U.S. at 439. For example, a private "market participant" cannot violate the antitrust laws. This Court has justified the Commerce Clause immunity of the "market participant" exception by noting that the antitrust laws apply to states acting as "market participants." *South-Central Timber Dev.*, 467 U.S. at 98-99 (1984) (plurality opinion). *See generally* Barton B. Clark, Comment, *Give 'Em Enough Rope: States, Subdivisions and the Market Participant Exception to the Dormant Commerce Clause*, 60 U. Chi. L. Rev. 615, 629 (1993) (recommends that courts look to the antitrust laws to ensure that states do not abuse their powers in the guise of "market participants"). Indeed, the court below implicitly recognized the potential antitrust implications of its decision, since it remanded this case to the district court "for further proceedngs" with respect to a possible "claim under the Sherman Act" and other issues. (Pet. App. at 46c.)

oly power was authorized by the state [12] simply confirms the fundamental point—Babylon is acting in its governmental capacity as a market regulator, not as a market participant. This action alone should negate any claim of market participant status.

This case provides a perfect opportunity for this Court to delineate the contours of the "market participant" doctrine. Left on their own, lower courts are abusing that doctrine and, in so doing, are encouraging states and localities to make counterfeit claims of being "market participants" so that they can discriminate against interstate commerce. This Court must step in to keep the "market participant" doctrine from swallowing the dormant Commerce Clause rule.

CONCLUSION

For the foregoing reasons, the petitions for certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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[12] (Pet. App. at 81a.)